Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

October Term, 1994

WILLIAM and DEBRA LARSSON,

Petitioners,

v.

CITY OF LAKE OSWEGO, OREGON,

Respondents.

Petition For Writ Of Certiorari
To The Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

Thomas H. Nelson
Counsel of Record
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Suite 2300
Portland, OR 97204-1268
Telephone: (503) 224-3380
Counsel for Petitioners

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QUESTION PRESENTED

May a municipality condition a land use authorization upon the applicants' surrender of their own and their successors' right to oppose formation of a local improvement district?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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OPINIONS BELOW

The Findings, Conclusion, and Order of the Lake Oswego City Council upholding the validity of the challenged non-remonstrance agreement is reprinted in the Appendix ("App.") at 40a. That order was appealed to the next appellate body in Oregon, the Land Use Board of Appeals ("LUBA") (LUBA

No. 93-174). Its order denying relief is reported at 26 LUBA 515 (1994) and is reprinted in the App. at 13a. The LUBA order was appealed to the Oregon Court of Appeals (C.A. No. A83141) and its decision denying relief is reported at 127 Or. App. 647, 874 P.2d 99 (1994) and is also reprinted in the App. at 50a. A timely petition for review of the decision of the Oregon Court of Appeals was filed with the Oregon Supreme Court (S.C. No. S41368). A majority of the Oregon Supreme Court decided not to grant the petition for review (see App. at 54a); Justice Durham would have granted the petition. 320 Or. 110, 881 P.2d 141 (1994).

JURISDICTION

The decision of the Oregon Court of Appeals, review of which is sought on petition, was entered on May 4, 1994. On September 6, 1994, the Oregon Supreme Court denied review. This Court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1257(a) (1994).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

42 U.S.C.A. § 1983 (1994) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1973i(a) (1994) provides:

> No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of subchapters I-A to I-C of this chapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

28 U.S.C.A. § 1257(a) (1994) provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of

> the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

William and Debra Larsson petition this court for a writ of certiorari to the Oregon Supreme Court to review the opinion in *Larsson v. Lake Oswego*, 127 Or. App. 647, 874 P.2d 99 (1994).

A. The Facts.

In 1990 the City of Lake Oswego (the "City") approved Petitioners' application to divide their property upon which their home was (and is) located into two lots. In the order approving that minor partition, the City administrative staff imposed a number of conditions on the Larssons, among them that they provide a cash deposit for future construction of bikepaths adjacent to the property, *see* App. 51a, and that they enter into a "non-remonstrance agreement" with the City, *see* App. 56a. By its terms, the nonremonstrance agreement, which is to run for 20 years unless extended for an additional 20 years by the City, (1) states that the Larssons and their successors thereby waive "any and all right to remonstrate against" future street improvements, (2) contains an "irrevocable consent" to formation of a Local Improvement District ("LID"), (3) states that the Larssons and their successors "consent" to the inclusion of their property within the zone of benefit for assessment purposes, and (4) asserts that the Larssons and their successors thereby waive any right to

remonstrate against future assessment practices. The non-remonstrance agreement is reprinted at App. 56a.

B. Challenges to Nonremonstrance Agreement.

The Larssons were not represented by legal counsel during the course of the minor partition activities. Once issued, the minor partition decision was not appealed, and consequently the property has since been divided into two lots. In 1993, however, the Larssons came to suspect the validity of the two conditions described above, and accordingly they sought modification of the prior decision by deleting the two conditions and seeking a refund of the bikepath funds already paid to the City.

The administrative staff denied the Larssons' request for relief, and thus the matter was appealed to the City's Development Review Board, which also denied relief. *See* App. 43a-44a. At that point the matter was appealed to the City Council, which rescinded the requirement that funds be deposited for bikepaths and ordered those funds repaid with interest. *See* App. 52a. That refund has since been paid. The City Council, however, refused to rescind the condition requiring a nonremonstrance agreement, whereupon that refusal was appealed to the next Oregon appellate body, LUBA. LUBA likewise refused relief, App. 1a, and the Oregon Court of Appeals affirmed the LUBA decision without independent justification for its reasons for so doing. App. 1a. Petitioners timely sought discretionary review in the Oregon Supreme Court. After filing that petition, this Court handed down *Dolan v. Tigard*, 114 S. Ct. 2309 (1994) ("*Dolan*"), which case arose in Tigard, Oregon, a municipality that abuts the City on the west. Because the Larssons have continuously claimed that the City's required submission of the nonremonstrance agreement violated the doctrine of unconstitutional conditions, Petitioners brought that portion of the *Dolan* opinion dealing with unconstitutional conditions to the Oregon Supreme Court's attention.

Nonetheless, the Oregon Supreme Court denied discretionary review. App. 54a.

The federal question was raised at every level, *viz.*, before the Lake Oswego Administrative Staff, *see* App. 68a; the Lake Oswego City Council, *see* App. 40a; before LUBA, *see* App. 13a; before the Oregon Court of Appeals, *see* App. 1a; and before the Oregon Supreme Court, *see* App. 54a.

REASONS FOR GRANTING THE WRIT

The nonremonstrance agreement, a commonplace in Oregon and perhaps many other states,[1] is yet another result of government's abuse of its power to condition land use permits in order to gain unwarranted advantage over private property owners. In recent years this Court twice struck down governmental exactions of property interests in return for land use authorizations. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan*. Here, however, the governmental target was not a simple property right; rather, here the government required the surrender of the applicants' civil and political rights in return for a land use authorization.

This petition requests the Court to accept this case for review for two substantive and interrelated reasons, *viz.*, that the nonremonstrance agreement violates Petitioners' civil and political rights and that the nonremonstrance agreement, like the property taken in *Dolan*, was exacted as the consequence of an unconstitu-

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[1] An informal survey indicated that many Oregon cities and counties employ nonremonstrance agreements to facilitate the formation of LIDs; indeed, the League of Oregon Cities filed an *amicus* brief in support of the City before the Oregon Court of Appeals. *See* App. 1a.

tional condition in a land use authorization. In *Dolan*, this Court discussed the practice of unconstitutional conditions as follows:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. See *Perry v. Sindermann, 408 U.S. 593 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972); Pickering v. Board of Ed. of Township High School Dist., 391 U.S. 563, 568 88 S. Ct. 1731, 134, 20 L.Ed.2d 811 (1968).*

114 S. Ct. 2309, 2317 (1994).

Review is particularly appropriate in this instance because, although the Oregon Supreme Court was explicitly requested to consider the Larssons' claim of unconstitutional conditions in light of the instructions this Court gave in *Dolan*, *see* App. 70a, that court declined even to consider the issue. Accordingly, at a minimum Petitioners request that this Court grant the petition for certiorari and instruct the Oregon Supreme Court to apply the doctrine of unconstitutional conditions as announced in *Dolan* to the present controversy.

I.

THE NONREMONSTRANCE AGREEMENT VIOLATES THE FIRST AMENDMENT TO THE U.S. CONSTITUTION[2]

The first question is whether the nonremonstrance agreement can reasonably be interpreted as affecting speech[3] because, if it does affect speech, important constitutional guarantees are triggered. Beginning with the words of the agreement itself--"we hereby expressly waive *any and all right to remonstrate*," App. 56a (emphasis added), it is clear that speech is the intended target of the City's requirement. The common dictionary defini-

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[2] The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. The First Amendment governs actions of states, *Gitlow v. New York*, 268 U.S. 652 (1925), as well as municipal actions. *Lovell v. City of Griffin, Ga.*, 303 U.S. 444 (1938).

[3] Of course, "speech" protected by the First Amendment is not limited to traditional reasoned political discourse; indeed, the following activities have been found to trigger First Amendment protections: flag burning, *United States v. Eichman*, 496 U.S, 310 (1990); superimposing material on U.S. flag, *Spence v. Washington*, 418 U.S. 405 (1974); long hair and beards, *see, e.g., King v. California Unemployment Ins. Appeals Bd.*, 25 Cal. App. 3d 199, 101 Cal. Rptr. 660 (1972); and offensive bumper stickers, *Baker v. Glover*, 776 F. Supp. 1511 (M.D. Ala. 1991). In this controversy, however, the speech targeted by the City is purely political in nature.

tion of "remonstrate" is "*[T]o say or plead* in protest, reproof, or opposition ~ *vt* : to present and urge reasons in opposition . . . ." *Webster's Seventh New Collegiate Dictionary* 725 (1971) (emphasis added).[4] There can be no doubt that the purpose of the nonremonstrance agreement is to restrict the ability of those bound by nonremonstrance agreements to express opposition to an action that the government desires to take.

A second important question is how the nonremonstrance agreement affects speech. Again, the answer is clear: As construed by LUBA, the agreement attempts to restrict the only effective means available to oppose City formation of LIDs--submission of written remonstrances.[5] LIDs are routinely formed to improve streets and carry out other construction and maintenance projects and, under the Lake Oswego City Charter, the only legal way a citizen can effectively oppose formation of a LID is by filing a written "remonstrance" with City officials. App. 23a.

In sum, the right to remonstrate is the right to speak, and the purpose of the nonremonstrance agreement is to restrict property owners' rights to express opposition to a governmental policy. As a result, First Amendment protections are triggered.

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[4] A more recent dictionary defines "remonstrance" as "an earnest presentation of reasons for opposition or grievance; *esp*: a document formally stating such points." *Webster's Ninth New Collegiate Dictionary* 996 (1989).

[5] As LUBA states, the nonremonstrance agreement reflects an "agreement that [the Larssons] will not file a LOC 40.050(1) remonstrance with the city recorder." App. 23a.

A. The Nonremonstrance Agreement Unconstitutionally Regulates the Content of Political Speech.

As noted above, the simple definition of "remonstrate" establishes that speech is the target of the agreements, and the speech intended to be prevented is clearly political in nature. Speech, and particularly political speech, is protected by the First Amendment.

To determine the validity of a government action claimed to restrict freedom of expression, the First Amendment requires the judiciary first to determine whether the act is intended to restrict communication. Government action aimed at restricting expression is suspect. As this Court stated in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Neither are governments permitted to justify the infringement on the basis of some general public good; for example, in *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court ruled that the state Board of Pharmacy could not justify restrictions on pharmacist advertising by referring to the negative consequences of price competition among pharmacists. The Court stated that the First Amendment favors free expression over otherwise important public goals.

Once it is determined that the governmental action is intended to restrict free expression, the action is unconstitutional unless the government can demonstrate that the expression is unprotected or that the restriction is necessary in order to achieve a compelling state interest. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980). A remonstrance is clearly protected speech, and thus the question becomes whether the nonremonstrance agreement is necessary to accomplish a compelling state interest. In this vein, the City identified only *one* benefit

from requiring the nonremonstrance agreement: avoiding a potential six-month delay in LID formation. App. 47a. Avoiding a potential six-month delay is simply *not* a compelling state interest.

There is, however, a second benefit accruing to the City that was not articulated: the procedural advantage of escaping political and other opposition when it seeks to improve local governmental services. Put less charitably, the nonremonstrance agreement can be viewed as an attempt to allow the City to ride roughshod over those who might want to question its development plans. The agreement appears to be premised on the notion that the City operates more efficiently when there is no effective opposition to the government's chosen course--a proposition that, frankly, is an anathema to freedom. In any event, this unacknowledged "benefit" likewise surely can not rise to the level of a "compelling state interest."

The City Council suggested that the agreement be upheld because no one forced the Larssons to apply for the partition. App. 49a. This point merely reinforces the basis for an independent constitutional challenge, *viz.*, that government may not condition a benefit on the surrender of a constitutional right. Moreover, addressing the agreement itself, there was no bargaining or choice; the City dictated the terms of the nonremonstrance agreement and required that those express words be adopted as a condition of approval of the partition. The assertion that the nonremonstrance agreement was freely entered into is simply wrong.

B. The Nonremonstrance Agreement Is Unconstitutional Because its Vagueness Chills Protected Speech.

Not only does the nonremonstrance agreement unconstitutionally restrict political speech, it unconstitutionally chills the exercise of First Amendment freedoms. Because the nonremonstrance agreement is contained as a condition in a development permit, a reasonable person bound by such an agreement would reasonably want to know what sanctions could be imposed for breach of the agreement. And there are indeed sanctions for violating such an agreement; specifically, section 49.16.050(1) of the Lake Oswego City Code provides:

> Any person who fails to comply with, or who violates, any provision of this chapter, *or who fails to carry out the terms and conditions of any development approval*, shall have committed a civil infraction subject to a forfeiture of not less than $50.00 or more than $500.00 per violation and enforceable pursuant to LOC 34.04.101 to 34.04.145. Each day that the violation exists shall constitute a separate violation.

(Emphasis added.)[6] Section 49.16.050 is reprinted as App. 55a. LUBA conceded that neither the agreement itself nor the City Code contains a definition of "remonstrance" or "remonstrate,"[7] and LUBA spent considerable effort simply trying to divine what all might be encompassed within the term. App. 18a-25a.

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[6] Interestingly, although the criminal sanction for violation of the nonremonstrance agreement was briefed and argued to LUBA, the board did not consider that sanction in its order.

[7] During oral argument before LUBA the City conceded that it would indeed enforce the nonremonstrance agreement.

Given the vagueness of the prohibition and the potential magnitude of the penalty, it is to be expected that communications not directly prohibited by the nonremonstrance agreement will be foregone. These factors all suggest a separate basis for invalidating the nonremonstrance agreement: It chills protected political speech. As a leading text states:

> Several rationales require special judicial strictness when reviewing laws that regulate fundamental constitutional rights, such as the freedoms of speech, assembly, or association, to insure that such regulations are not vague. First, the requirement that a law place persons on notice as to precisely what activity is made criminal is of special importance when the activity distinguishes between criminal activity and activity that constitutes a fundamental constitutional right. To the extent that the law is vague and relates to fundamental constitutional rights, it might have an "in terrorem" effect and deter persons from engaging in activities, such as constitutionally protected speech, that are of particular constitutional importance. In other words, an unclear law regulating speech might deter or chill persons from engaging in speech or activity with special protection under the Constitution.

John E. Nowak et al., *Constitutional Law* § 16.9 (3d ed. 1986).

Because the scope of the prohibition is uncertain at best, the Larssons (and the hundreds of persons similarly situated) cannot know in advance what specific conduct is prohibited. Because significant criminal sanctions lie for violation of the prohibition, the Larssons and persons similarly situated can

reasonably be expected to eschew engaging in protected speech in order to avoid any possibility of violating the prohibition. For these reasons, the prohibition itself must be declared invalid and void.

C. The Nonremonstrance Agreement Is Unconstitutionally Overbroad.

Yet another First Amendment doctrine compels the invalidation of the nonremonstrance agreement: overbreadth. The overbreadth doctrine, which to some degree parallels the "void for vagueness" doctrine discussed above, applies when the government seeks to regulate communications in a manner that *might* mute protected speech, leaving perceived grievances to fester. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *see also Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (even an otherwise legitimate restriction must be exercised in a manner that avoids undue infringement on protected speech).

Under the doctrine of overbreadth, the court may not only consider the impact of the nonremonstrance agreement on Petitioners, it must also consider the potential impact of such agreements upon third parties. Although jus tertii--raising the rights of third parties not before the tribunal--generally is not allowed, when First Amendment freedoms are involved the tribunal must entertain *possible* restrictions of speech that *may* be unconstitutional if applied to third parties in certain circumstances. *Broadrick*, 413 U.S. 601; *see also Bigelow v. Virginia*, 421 U.S. 809 (1975) (information regarding abortion). Based upon a cursory review of the property records in the Clackamas County courthouse, it appears that the City has recorded approximately

175 nonremonstrance agreements in the past seven years alone.[8] Many of those agreements appear to have been taken from large developers before construction of dwellings, and therefore many of those bound by nonremonstrance agreements will have had no opportunity whatsoever to negotiate or even address the terms and scope of the agreement that purports to bind them. Certainly a reasonable layperson with only a dictionary would feel a chill on his First Amendment freedoms when informed that his predecessor in title had "waived" his right to "remonstrate" against future City development actions.

The overbreadth doctrine requires the Court not only to consider the actual application of the government action in the instant circumstances but also to consider "possible applications of the statute in other factual contexts besides that at bar." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). In this vein, the Court should consider how the hundreds of other property owners who are bound by identical nonremonstrance agreements might reasonably perceive the restrictions those agreements place on them. Because the agreements are drafted in a broad fashion (*e.g.*, by prohibiting "*any and all* right to remonstrate," LUBA Rec. 143), one bound thereby reasonably could conclude that *any* expressed opposition to a proposed government policy is circumscribed. Such a person might reasonably conclude that the prohibition against "any and all" remonstrances encompasses a *letter* to the mayor regarding street improvements. And would it not be reasonable for a person bound by such an agreement to believe that he may not even disagree with the *method* of implementation of such improvements? Could such a person feel safe in discuss-

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[8] Another one of those hundreds of nonremonstrance agreements was the subject of recent litigation in the Oregon Court of Appeals, *Nelson v. Lake Oswego*, 126 Or. App. 416, 869 P.2d 350 (1994), and was mentioned in the Nelsons' *amicus* brief submitted in support of the Petitioners in *Dolan v. Tigard*, 114 S. Ct. 2309 (1994).

ing future street improvements with their neighbors if such might lessen the likelihood of the City's plan for improvements being adopted? And what sanctions might such a person fear as a consequence of violating the covenant? A lawsuit for damages? If so, how much? An injunction? Would the City attempt to enforce the nonremonstrance agreement by resort to the criminal sanctions of section 49.16.050(1) of the Lake Oswego City Code?[9] In light of these considerations, it should not be surprising that those bound by these pernicious agreements will be reluctant to express publicly any views on future City action regarding streets and physical development of the neighborhood unless nonremonstrance agreements are declared invalid.

D. The Nonremonstrance Agreement Unconstitutionally Compels Political Speech.

Even if the nonremonstrance agreement could be read both precisely and narrowly, it would be invalid on a variety of other First Amendment grounds. For example, one of the primary directives of the First Amendment is that freedom *of* speech connotes freedom *from* speech. Put differently, the First Amendment prevents the government from compelling individuals to

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[9] That provision provides:

> Any person who fails to comply with, or who violates, any provision of this chapter, *or who fails to carry out the terms and conditions of any development approval*, shall have committed a civil infraction subject to a forfeiture of not less than $50.00 or more than $500.00 per violation and enforceable pursuant to LOC 34.04.101 to 34.04.145. Each day that the violation exists shall constitute a separate violation.

App. 55a.

adopt positions with which they disagree. Thus New Hampshire could not prevent a motorist from covering up the license plate slogan, "Live Free or Die." *Wooley v. Maynard*, 430 U.S. 705 (1977); *see also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (government may not compel press to provide political candidates with right to reply to newspaper's criticism). Here, however, the City's nonremonstrance agreement required Petitioners to "irrevocably *consent* to the formation of a Local Improvement District . . . the inclusion of [their] property within a zone of benefit . . . ." App. 56a (emphasis added). Because the nonremonstrance agreement compelled Petitioners (and, for that matter, all of their successors in title) to adopt a position with which they may well disagree, it violates the First Amendment to the U.S. Constitution.

E. The Nonremonstrance Agreement Unconstitutionally Inhibits the Right To Petition for Redress of Grievances.

There is yet another substantive reason the City's attempted justification should not be allowed to stand. The purpose of the nonremonstrance agreement is to authorize the City to disregard completely any political positions that Petitioners may urge upon it. This position is akin to asserting, "You can talk, but we won't listen." Put into First Amendment terms, the assertion would be, "You can seek to be heard all you want; because of the nonremonstrance agreement, we don't have to listen." This is not freedom of expression, for freedom of expression is not limited to the right to speak; rather, freedom of expression (and particularly the right to petition the government for redress of grievances) connotes the right to be *heard* in a meaningful way. The agreement denies Petitioners that right to be heard.

For all of the foregoing reasons, the nonremonstrance agreement violates the First Amendment to the U.S. Constitution.

F. The Nonremonstrance Agreement Impairs Voting Rights.

One effect of the nonremonstrance agreement is to register a positive vote in favor of LID formation. Such effect violates federal law by disenfranchising those who are forced to sign the agreements and their successors in title. Two federal statutes are implicated by the City's demand for a nonremonstrance agreement, *viz.*, the Voting Rights Act, 42 U.S.C.A. § 1973i(a) (1994), and the general civil rights statute, 42 U.S.C.A. § 1983 (1994).

This claim is, of course, based on the proposition that nonremonstrance agreements affect the right to vote. Unfortunately, "vote" is not defined in the statutes, and thus its common meaning must be determined. The first four definitions of "vote" in *Words and Phrases* are:

> A "vote" is but expression of voter's will. State ex rel. Thrailkill v. Amlin, 13 Ohio Dec. 334.
>
> The noun "vote" means expression of the choice or preference of a voter. Mann v. Housing Authority of City of Paterson, 89 A.2d 725, 727, 20 N.J.Super. 276.
>
> A "vote" is a formal expression of a wish, will, or choice in regard to any measure proposed. Port of Palm Beach Dist. v. State, 22 So.2d 581, 582, 156 Fla. 99.
>
> A "vote" is the registration in accordance with law of the preference or choice of an elector on a given subject. State v. State Board of Canvassers, 172 N.W. 80, 87, 44 N.D. 126.

44A Words and Phrases 3 (perm. ed. 1962). From the foregoing it is clear that, because the Larssons' right to register their preference regarding the formation of LIDs is affected by the non-remonstrance agreement, voting rights are implicated.

II.

THE CITY MAY NOT CONSTITUTIONALLY REQUIRE THE SURRENDER OF CONSTITUTIONAL FREEDOMS IN RETURN FOR ITS ISSUANCE OF A DEVELOPMENT PERMIT.

One of Petitioners' central arguments has been that the City may not condition the issuance of a development permit upon the surrender of First Amendment or other constitutional freedoms. A review of the doctrine of unconstitutional conditions establishes that the exercise of governmental police power may not be conditioned upon a citizen's surrender of constitutional rights.

It is a longstanding principle that individual rights may not be "infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). In *Sherbert*, a Seventh-Day Adventist refused to work on Saturday and thus was fired. South Carolina thereupon refused unemployment compensation because of the failure to accept suitable work. This Court invalidated the denial on the grounds the right to a discretionary benefit--unemployment compensation[10]--could not be conditioned upon surrender of First Amendment freedoms. The Court said:

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[10] In the present situation the discretionary benefit was approval of a minor partition.

> In Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L.Ed.2d 1460, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly."

374 U.S. at 405 (citation omitted). Professor Tribe has succinctly stated the proposition:

> The notion that, whenever a privilege or benefit might be withheld altogether, it may be withheld on whatever conditions government chooses to impose, has been repeatedly repudiated since the mid-20th century. Independently unconstitutional conditions--those that make enjoyment of a benefit contingent on sacrifice of an independent constitutional right--are invalid; whether a condition is unconstitutional depends on whether government may properly demand sacrifice of the alleged right in the particular context.

Laurence H. Tribe, *American Constitutional Law* § 11-5 at 781 (2d ed. 1988) (footnote omitted).

Recent scholarship has traced the development of the doctrine of unconstitutional conditions and analyzed the increasing need for invocation of the doctrine. Richard A. Epstein, ***Bargaining with the State*** (1993) ("***Epstein***"). According to Professor Epstein, the doctrine is based on the fundamental precept that no entity--not a private party and certainly not the government--should be allowed to use its vastly superior bargaining power to wrest concessions of important rights under the guise of contractual negotiations.[11]

Adopting for a moment the notion that the non-remonstrance agreement reflects a simple commercial transaction (as opposed to fundamental First Amendment rights), would such an agreement be enforceable? Petitioners think not. The judiciary has long recognized that contracts of adhesion, particularly when

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[11] Some of the flavor of Professor Epstein's thesis can be captured from the concluding paragraph of his book:

> The power to contract and to grant, when lodged in the hands of government, may well prove to be as dangerous as the power to take and to regulate. The effort to create an unfettered source of government power at root rests on an apparent position that private parties are entitled to contract for good reason, bad reason, or no reason at all. It then exaggerates the scope of freedom of contract in private transactions, and imputes the same level of freedom to a government whose power must always be questioned [because of] the takings risk that results from its power of taxation and the bargaining risk that results from its monopoly position in all areas of life. . . . [A] government that has any level of monopoly power cannot be trusted to impose whatever conditions it wants . . . ."

Epstein, at 312.

obtained through the exercise of disproportionate bargaining power, are suspect. This notion is reflected in section 208 of the Restatement (Second) of Contracts (1981), which provides:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid the unconscionable result.

The wellspring of this doctrine is *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948), in which the court refused to enforce a standard printed form contract of adhesion on the grounds it was unconscionable. Here likewise there is a contract of adhesion because the City routinely requires applicants for land-use permits to execute identical nonremonstrance agreements.[12] Here, there is vastly disproportionate bargaining power because the Larssons cannot obtain the desired outcome--approval of a minor partition--from any entity other than the City. For the same reason that courts will not permit consumers to be unreasonably disadvantaged by commercial terms in contracts of adhesion, Petitioners submit that municipal bodies should not be allowed to wrest the most cherished civil and political liberties from citizens who merely seek approval to develop their own property.

Applying Professor Epstein's analysis, in the present situation the City is the monopolist: It alone has the power to determine how a landowner can use his own land, including the right to engage in minor partitions. LUBA and the Oregon Court

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[12] Indeed, very recently there was before the Oregon judiciary an identical nonremonstrance agreement. See *Nelson v. Lake Oswego*, 126 Or. App. 416, 869 P.2d 350 (1994).

of Appeals do not deny that the Larssons were faced with a stark choice: obtain approval for more beneficial use of their property or retain their political and civil rights. The City obviously demanded the surrender of the clearly political right to oppose formation of a governmental unit in return for its issuance of a development permit. Certainly the City could not have prohibited political opposition to LID formation directly (*e.g.*, by banning public utterances questioning the wisdom of such governmental bodies), so the City sought to achieve by indirection--using the notion of freedom of contract--to achieve that which it could not accomplish directly. Because the City's monopoly power over land use gives it an unequal bargaining position vis-a-vis property owners, it should not be allowed to impose the Hobson's choice of requiring those owners and their successors to surrender political freedoms or forego more beneficial use of their land.

For all of these reasons, the requirement that the Petitioners grant a nonremonstrance agreement in return for a land use authorization should be invalidated as an unconstitutional condition.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to grant the petition for writ of certiorari to the Oregon Supreme Court.

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Respectfully submitted,

Thomas H. Nelson
Counsel of Record
STOEL RIVES BOLEY JONES & GREY
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204
Telephone: (503) 224-3380

Counsel for Petitioners